No. 98-963

In The
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri; RICHARD ADAMS,
PATRICIA FLOOD, ROBERT GARDNER,
DONALD GANN, MICHAEL GREENWELL
and ELAINE SPIELBUSCH,
members of the Missouri Ethics Commission;
ROBERT P. MCCULLOCH,
St. Louis County Prosecuting Attorney,
*Petitioners*,

v.

SHRINK MISSOURI GOVERNMENT PAC;
ZEV DAVID FREDMAND; JOAN BRAY,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# BRIEF OF JAMES MADISON CENTER FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAND SUGGESTING AFFIRMANCE

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## INTEREST OF AMICUS

The James Madison Center for Free Speech is an internal educational fund of the James Madison Center Inc., a not-for-profit corporation.[1] The purposes of the James Madison Center are to promote, through educational activities, respect for the rights of freedom of speech and freedom of association guaranteed by the First Amendment to the United States Constitution, and to defend the rights of freedom of speech and freedom of association when threatened by government action.

## SUMMARY OF ARGUMENT

The right of free political speech is deeply embedded in our nation's history. The Founding Fathers had this right in mind when they drafted the First Amendment. To protect this right, the First Amendment demands that Congress shall make no law abridging the rights of free speech. Thus, the freedom of speech is a withholding of power from the government.

Despite this unequivocal denial of power from the government, preventing corruption or its appearance is the only single narrow exception to the rule that limits on political speech are contrary to the First Amendment. To ensure government does not contravene First Amendment rights except when addressing this single narrow exception, the Court has placed the burden of demonstrating corruption or its appearance on the government.

However, the government is not simply able to posit the existence of corruption or its appearance. Rather, rights

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[1] The parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

of political expression and association may not be infringed without substantial support in the record showing the need to do so. Without this evidentiary showing, virtually anything deemed politically undesirable could be turned into political corruption simply by citing to a mere potential for harm. Moreover, without a substantial showing, unreasonable and manipulated public perceptions of an appearance of corruption could serve as the justification for the infringement of cherished First Amendment rights. Missouri has made no showing that actual corruption or its appearance exists within its borders, and therefore has failed to meet its burden.

Missouri's contribution limit, as a restriction on First Amendment rights, must survive strict scrutiny. Therefore, Missouri must demonstrate that the limit it has chosen is narrowly tailored to prevent the demonstrated evil. Evidence demonstrates that Missouri is not regulating with narrow specificity when the percentage of one contribution of the average total expenditures for the Auditor race was so low as to be almost per se noncorrupting. Further, contribution limits are not narrowly tailored when they are so low as to be a cause of corruption.

The indispensable democratic freedoms secured by the First Amendment are not truly secure unless the government is required to bear the burden of providing evidentiary support for its restriction of free speech rights, and demonstrating that the limits chosen are narrowly tailored to address actual corruption or its appearance within its jurisdiction.



## ARGUMENT

### I. TO ENSURE THAT GOVERNMENT DOES NOT SUPPRESS FIRST AMENDMENT RIGHTS EXCEPT WHERE THERE IS THE UTMOST NEED TO DO SO, THE SUPREME COURT REQUIRES GOVERNMENT TO BEAR THE BURDEN OF PROVING THE EXISTENCE OF THE EVIL IT FEARS.

The Petitioners and several *amici* argue that under *Buckley v. Valeo*, 424 U.S. 1 (1976), the **Respondents** bear the burden of demonstrating that the contribution limits impose an undue restraint on their First Amendment rights. Pet'r Br. at 13, 22, 25, 41. Yet this Court has repeatedly held that to ensure that the government does not suppress First Amendment rights except where there is a compelling need to do so, the **government** must prove the existence of the evil it fears, the source from which it emanates, and that the means chosen are needed to eliminate the evil. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)("[W]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."); *First National Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978)(The State failed to show "by record or legislative findings that corporate advocacy threatened imminently to undermine the democratic processes."); *In re Primus*, 436 U.S. 412, 432 (1978)("South Carolina must demonstrate 'a subordinating interest which is compelling,' [citation omitted], and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms.'" (*quoting Buckley*, 424 U.S. at 25)); *Citizens Against Rent Control v. City Of Berkeley*, 454 U.S. 290, 301-02 (1981)(Marshall, J., concurring)("If I found that the record ... disclosed sufficient evidence to justify the conclusion that

large contributions to ballot measure committees undermined the 'confidence of the citizenry in government,' I would join Justice WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest."(citation omitted)); *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 266 (1986)(O'Conner, J., concurring in part and concurring in the judgment)("[I]n this case the Government has failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression."); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *Meyer v. Grant*, 486 U.S. 414, 426 (1988)("The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns."); *Burson v. Freeman*, 504 U.S. 191, 228 (1992)(Stevens, J., dissenting)("For that reason, Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary. . . ."); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)("It is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'"(citation omitted)). *See also Bellotti*, 435 U.S. at 786 (speaker-based restriction); *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 540 (1980)(content-based restriction); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-54 (1986)(secondary-effects restriction).[2]

[2] Lower courts have recognized this rule and have therefore also properly placed the burden upon the government. *See, e.g., Association of Community Orgs. for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983)("[A]lthough a duly enacted statute normally carries with it a presumption of constitutionality, when a regulation allegedly infringes on the exercise of First Amendment rights, the statute's proponent bears the burden of establishing the statute's constitutionality."(*citing Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987)("Where. . . a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality."); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990) ("It is a well-established rule that where legislation restricts speech, even commercial speech, the party seeking to uphold the restriction carries the burden of justifying it.")(*citing Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983)).



Requiring the government to bear this burden comports with the very purpose underlying the First Amendment which is "to foreclose public authority from assuming a guardianship of the public mind. . . ." *Thomas v. Collins*, 323 U.S. 516, 545 (1945)(Jackson, J., concurring); *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990)(Scalia, J., dissenting)("The premise of our Bill of Rights, however, is that there are some things-- even some seemingly *desirable* things-- that government cannot be trusted to do."(emphasis in original)). If a state were not required to bear this burden, a state could with ease restrict First Amendment rights in the service of other objectives that could not themselves justify a burden on political expression. *See Edenfield*, 507 U.S. at 771. Therefore, it is imperative that the government bear this burden. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996)("The need for the State to make such a showing is particularly great given the drastic nature of its chosen means-- the wholesale suppression of truthful, nonmisleading information.").[3]

[3] Furthermore, it is irrelevant that the State may have difficulty meeting this burden, *see Meyer*, 486 U.S. at 425 ("For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable."), if the statute at issue "trenches upon an area in which the importance of First Amendment protections is 'at its zenith,'" *id.* as does the Missouri statute here.

### A. In *Buckley*, This Court Required Proof That The FECA's Contribution Limits Were Necessary To Advance A Compelling Interest.

The Petitioners, and various *amici*, however, argue that *Buckley* stands for the proposition that a demanding review of the Government's evidence is not required.[4] Pet'r Br. at 29-36. What the Petitioners fail to note is that while the *Buckley* Court found it "unnecessary to look beyond the Act's primary purpose . . . in order to find a constitutionally sufficient justification for the $1,000 contribution limitation," 424 U.S. at 26, it was because "the deeply disturbing examples surfacing after the 1972 election demonstrate[d] that the problem [was] not an illusory one." *Id.* at 27. Thus, the Court found it unnecessary to look beyond the Act's purpose because it found "deeply disturbing examples" to support the Government's fears of actual and apparent corruption resulting from large contributions given to secure political quid pro quos. The *Buckley* Court cited the court of appeals' opinion which discussed a number of the abuses uncovered. *Id.* at 27 n.28. Dairymen had pledged, and then laundered, $2,000,000 in contributions in exchange for the President's decision to overrule the Secretary of Agriculture and increase dairy price supports. *Buckley v. Valeo*, 519 F.2d 821, 840 n.36 (D.C. Cir. 1975). Six ambassadorial candidates had donated a combined $3,000,000 for ambassadorial appointments, *id.* at 840 n.38, and one ambassador had contributed $100,000 in a trade for an even more prestigious post. *Id.* Therefore, the *Buckley* Court did look for, and found, evidence of *actual* quid pro quo corruption. *Buckley*, 424 U.S. at 27 n.28.

Even assuming *Buckley* applied a lower evidentiary standard, the requirement of evidentiary support should be applied with even more force to the case at bar. The key to the Court's apparent deference to Congress is that an appearance of corruption is "inherent in a system permitting unlimited financial contributions." *Buckley*, 424 U.S. at 28. Prior to the contribution limits addressed by the *Buckley* Court, there existed a system allowing *unlimited* contributions. Therefore, the Court could readily find proof of huge contributions given to secure political quid pro quos. In those jurisdictions where contribution limits already exist, evidentiary proof of actual or apparent corruption must be in the record before lowering the limits in order to satisfy the government's burden of justifying its restrictions on First Amendment speech and association.

### B. Subsequent To *Buckley*, This Court Has Required The Government To Bear The Burden Of Proof If It Sought To Infringe On First Amendment Rights.

Subsequent to *Buckley*, the Court has continued to require evidentiary support for a government's attempt to infringe on First Amendment rights. In *First National Bank v. Bellotti*, the Court struck down a Massachusetts law that prohibited corporations from making expenditures in state referendum campaigns, finding that the State had failed to show "by record or legislative findings that corporate

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[4] Prior to *Buckley*, the Court required evidentiary support in a case dealing with a statute prohibiting federal employees from participating in political campaigns. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973). The Court upheld the provisions of the Hatch Act "against a First Amendment challenge only after canvassing nearly a century of concrete experience with the evils of the political spoils system." *United States v. National Treasury Employees Union*, 513 U.S. 454, 483 (1995)(O'Connor, J., concurring in the judgment in part and dissenting in part); *cf. FCC v. League of Women Voters of California*, 468 U.S. 364, 401 n.27 (1984)(noting that the Hatch Act "evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government.").

advocacy threatened imminently to undermine democratic processes." 435 U.S. at 789.

> But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of citizenry in government.

*Id.* at 789-90.

Shortly after *Bellotti*, the *Primus* Court also found that rights of political expression and association may not be abridged because of state interests "without substantial support in the record or findings of the state court." *In re Primus*, 436 U.S. 412, 434 n.27 (1978)(*citing Bellotti*, 435 U.S. at 789-90; *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 581 (1971); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *NAACP v. Button*, 371 U.S. 415, 442-43 (1963); *Wood v. Georgia*, 370 U.S. 375 (1962); *Thomas v. Collins*, 323 U.S. 516 (1945)). Specifically, the *Primus* Court found that "[t]he record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case." *Id.* at 434-35. And, a "'very distant possibility of harm,' *Mine Workers v. Illinois Bar Assn.*, 389 U.S., at 223, 88 S.Ct., at 356, cannot justify proscription of the activity of appellant revealed by this record." *Primus*, 436 U.S. at 436 (*quoting United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967)).[5]

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[5] Likewise, the *Button* Court had previously reached the same conclusion. The *Button* Court found that a potential for conflict of interest or injurious interference with the attorney-client relationship was insufficient in the absence of proof of a "serious danger" of conflict of interest, 371 U.S. at 443, or of organizational interference with the actual conduct of the litigation. *Id.* at 433, 444.



In *Citizens Against Rent Control v. City of Berkeley*, the Court was faced with a statute limiting contributions to $250 to committees formed to support or oppose ballot measures. 454 U.S. 290. In striking down the statute as contravening the First Amendment, Justice Marshall, in concurrence, addressed the State's failure to provide sufficient evidentiary support:

> If I found that the record before the California Supreme Court disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the "confidence of the citizenry in government," [citations omitted], I would join Justice WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest to sustain the indirect infringement on First Amendment interests. . .

454 U.S. at 301-02 (Marshall, J., concurring). Also concurring that the statute was unconstitutional, Justices Blackmun and O'Connor compared the evidentiary support lacking in *Berkeley* to the "equally sparse" record in *Bellotti*. *Id.* at 303.

The Court again reiterated the necessity for evidentiary support for restrictions upon First Amendment rights in *National Treasury Employees Union*:

> [w]hen a Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.

513 U.S. at 475 (*quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664-66 (1994)(plurality opinion of Kennedy, J.)); *see also NTEU*, 513 U.S. at 483, 485 (O'Connor, J., concurring in part and dissenting in part)(The Court's "cases do not support the notion that the bare assertion of a laudable purpose justifies wide-ranging intrusions on First Amendment liberties" "without any showing that Congress considered empirical or anecdotal data pertaining to abuses by lower echelon Executive branch employees.").

More recently, the Court has required evidentiary support for the Government's claim that political parties can be prohibited from making independent expenditures. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996)("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures.").

Even within the commercial speech context, which permits laws to burden commercial speech only upon a showing of a rational basis, this Court has required proof that the harms to be restricted are real and not mere speculation or conjecture. *See Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 2150 (1997)(Souter, J., dissenting)(Under *Turner*, 512 U.S. at 664, the government has an "obligation to establish the empirical reality of the problems it purports to be addressing" in order to justify an underinclusive regulation of commercial speech.).

In *Edenfield*, for instance, the Court held that a government's burden

> is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.



507 U.S. at 770-71 (*citing Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985); *Bolger*, 463 U.S. at 73; *In re R.M.J.*, 455 U.S. 191, 205-06 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 569 (1980); *Freidman v. Rogers*, 440 U.S. 1, 13-15 (1979); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977)). Justifying the imposition of this requirement, the Court stated that "[w]ithout this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* at 771. In finding this burden was not met, the Court noted the absence of any

> studies that suggest personal solicitation. . . creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear. The record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions.

*Id.*[6]

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[6] Outside the First Amendment context, the Court has also long required evidence to justify burdening rights guaranteed under the Constitution. *See Turner*, 512 U.S. at 667 ("[w]ithout a more substantial elaboration. . . of predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence. . . we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions. . . ."). In *Muller v. Oregon*, as a result of the provision of empirical evidence of the working conditions facing women in factories, the Court upheld a state law regulating work place safety at a time when the Court did not seem supportive of such regulations. 208 U.S. 412, 419-20 (1908); *see also Chandler v. Miller*, 520 U.S. 305, 319 (1997)(holding that compulsory drug testing of candidates for certain state offices violated the Fourth Amendment where "[n]othing in the record hints that the hazards [the state] broadly describe[s] are real and not simply hypothetical.").

More recently, the Court has held that Congress lacked the authority under the Commerce Clause to make it a crime to carry a gun within 1,000 feet of a school because Congress failed to demonstrate that gun possession in a local school zone affected interstate commerce. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

The Petitioners and *amici* cite *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), as support for their argument that deference is due to government restrictions on First Amendment rights and therefore no evidentiary support is required. Pet'r Br. at 27. *NRTW* involved an interpretation of "member" as defined in the Federal Election Campaign Act and whether a corporation or labor union may solicit contributions to a fund only from "members." However, the Court found evidentiary support for this restriction in the "history of the movement to regulate the political contributions and expenditures of corporations and labor unions" that was set out "in great detail in *United States v. Automobile Workers*." *NRTW*, 459 U.S. at 208. After summarizing the development of the regulation of corporations and labor unions, the Court found the statute at issue was "merely a refinement of this gradual development of the federal election statute." *Id.* at 209. The Court cited several cases and statutes documenting the fact that special characteristics of corporations and unions require careful regulation. *Id.* at 208-10 (*citing United States v. Automobile Workers*, 352 U.S. 567 (1957); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937); *Rostker v. Goldberg*, 453 U.S. 57, 64, 67 (1981); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); Tillman Act, ch. 420, 34 Stat. 864; Act of June 25, 1910, ch. 392, 36 Stat. 822; Act of Aug. 19, 1911, ch. 33, 37 Stat. 25; Federal Corrupt Practices Act, 43 Stat. 1070 (1925); Hatch Act, 54 Stat. 767; War Labor Disputes Act of 1943, § 9, 57 Stat. 167; Taft-Hartley Act, 61 Stat. 136; Federal Election Campaign Act of 1971, 86 Stat. 3, *amended* 88 Stat. 1263 (1974), *amended* 90 Stat. 475 (1976), *amended* 93 Stat. 1339 (1980)).



Evidence that *NRTW* did not abolish the requirement of evidentiary support can be found in this Court's refusal to apply *NRTW's* deference to a federal law that prohibited independent expenditures by political action committees. In *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), this Court examined the record evidence and found that it was only "a hypothetical possibility and nothing more" that an exchange of political favors for uncoordinated expenditures would occur, and consequently was insufficient to demonstrate that the threat of corruption justified the independent expenditure restriction. *Id.* at 498. Thus, the Court agreed with the district court that the "evidence f[ell] far short" of supporting a finding of corruption or its appearance, that the evidence was "evanescent" and that its tendency to demonstrate a distrust of PACs was not sufficient. *Id.* at 499-501. In so doing, the Court noted that *NRTW's* deference to the need for a prophylactic rule was because the "evil of potential corruption had *long been recognized*." *Id.* (emphasis added). Therefore, contrary to the Petitioners' assertion that *NRTW* requires automatic deference to a government's claim of potential harm, *NRTW*, which found historical evidentiary support, is consistent with the requirement of evidentiary support to justify a restriction of First Amendment rights.

The Petitioners also argue that the modified burden of proof applied in *Munro* and *Timmons* should apply to this case. Pet'r Br. at 32-33. In *Timmons*, the Court stated that "[e]laborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (*citing Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). Although the state did not need empirical evidence, the dissent noted that previous cases have required more than a bare assertion that some particular state interest was served by a burdensome election requirement. *Id.* at 375 (Stevens, J., dissenting).

*Munro* is not analogous to the case at bar for two reasons. First, *Munro's* "modified burden of proof" does not apply to all cases in which there is a conflict between First Amendment rights and a state's election process. Instead it applies only when the First Amendment right threatens to interfere with the act of voting itself, *i.e.*, cases involving voter confusion from overcrowded ballots, like *Munro*, or cases such as *Burson*, where the challenged activity physically interfered with electors attempting to cast their ballots. However, States must come forward with more specific findings to support regulations directed at intangible "influence," such as the ban on election-day editorials struck down in *Mills v. Alabama*, 384 U.S. 214 (1966). *Burson*, 504 U.S. at 209 n.11. There is no First Amendment right in the case at bar that is threatening to interfere with the act of voting to mandate application of *Munro's* modified burden.

Second, the contribution limitations here result in a significant impingement on constitutionally protected rights, thus preventing application of *Munro's* modified burden of proof. *See Burson*, 504 U.S. at 210 (The plurality extended *Munro's* reasoning and applied a modified burden of proof because the "minor geographic limitation" did not constitute a "significant impingement" on constitutionally protected rights.).

Thus, this Court has long required evidentiary support to justify restrictions on speech, including speech occupying a subordinate position on the scale of First Amendment values, and restrictions on other constitutional rights. Therefore, it should be undisputable that under the cherished First Amendment, evidentiary support should be the minimum required to sustain a campaign finance regulation that impinges upon core First Amendment speech. The First Amendment demands no less. *See generally* Bopp, *Constitutional Limits On Campaign Contribution Limits*, 11 Regent U. L. Rev. 235 (1998-99).

If the Court were to overturn the precedent of requiring evidentiary support, as urged by the Petitioners and



*amici*, its effects on the fortress of First Amendment jurisprudence would be far-reaching and devastating. As Justice Scalia pointed out in his dissent in *Austin*, permitting a mere potential for harm to justify restrictions on First Amendment rights would require the "adjustment of a fairly large number of significant First Amendment holdings." *Austin*, 494 U.S. at 689.

> Presumably the State may now convict individuals for selling books found to have a potentially harmful influence on minors, ban indecent telephone communications that have the potential of reaching minors, restrain the press from publishing information that has the potential of jeopardizing a criminal defendant's right to a fair trial, or the potential of damaging the reputation of the subject of an investigation, compel publication of the membership lists of organizations that have a potential for illegal activity, and compel an applicant for bar membership to reveal her political beliefs and affiliations to eliminate the potential for subversive activity.

*Id.* at 689-90. (internal citations omitted). "The Court's explicit acceptance of 'potential danger' as adequate. . . greatly weakens" the fortress of First Amendment jurisprudence. *Id.* at 690.

The reason for the requirement of demonstrable evidence of real or apparent corruption is plain. Allowing a mere potential for harm to justify a restriction of core First Amendment rights would permit legislatures around the country to unduly burden speech deemed undesirable or unpopular. Therefore, the government, in bearing its burden, must come forth with jurisdiction-specific evidence showing corruption or its appearance before it may restrict the First Amendment rights of its citizens.

## II. AS THE COURT OF APPEALS CORRECTLY HELD BELOW, MISSOURI HAS FAILED TO CARRY ITS BURDEN OF DEMONSTRATING THE EXISTENCE OF CORRUPTION OR ITS APPEARANCE IN THIS CASE.

One *amicus* mistakenly suggests the First Amendment does not permit this Court to review the evidence and "conduct a trial *de novo*." Pub. Citizen Br. at 7, 20. However, "[t]his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied." *Primus*, 436 U.S. at 434.

A review of the evidence offered by Missouri shows that it falls short of demonstrating the existence of corruption or its appearance in Missouri. *See* J.A. 46-49. The evidence offered, affidavits from a single legislator and a member of the Missouri Campaign Finance Review Board, is slender, self-serving, and insufficient. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 641 (1995)("Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech." (citation omitted)); *Edenfield*, 507 U.S. at 771 ("The only suggestion that a ban on solicitation might help prevent fraud and overreaching. . . is the affidavit of Louis Dooner, which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its jurisdictions."). A single legislator's perception of corruption provides no way to determine whether his perception is also shared by the public, whether that perception is objectively reasonable, and whether it is derived from the magnitude of contributions that have historically been made. J.A. 7a.



As the court of appeals correctly noted, the senator's affidavit is insufficient evidence because he

> pointed to no evidence that "large" campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof. [citation omitted]. The senator did not state that corruption then existed in the system, only that he and his colleagues believed there was the "real potential to buy votes" if the limits were not enacted, and that contributions greater than the limits "have the appearance of buying votes."

J.A. 6a-7a.

The court of appeals correctly refused to extrapolate from examples of corruption noted by the *Buckley* Court that problems resulting from large contributions made to federal campaigns over twenty-five years ago demonstrate actual corruption or its appearance in Missouri. J.A. 6a. Requiring the State to prove actual corruption or its appearance within its borders is especially important when dealing with the First Amendment because "when the reason for a restriction disappears, the restriction should as well." *Burson*, 504 U.S. at 223 (Stevens, J., dissenting) (citing courts that found campaign-free zones were no longer necessary). Therefore, to impose a restriction upon First Amendment rights, the State must be required to establish, with evidence, that the contribution limit is necessary in Missouri to combat corruption or its appearance stemming from large contributions. Great care should be taken so that tradition is not confused with necessity and thus allowed to justify a restriction on core First Amendment speech.

Missouri also failed to prove an appearance of corruption exists within its borders. Of the State's evidence, only two pieces even remotely support its position. The first, Senator Goode's affidavit, states he "believe[s] today that contributions over those limits have the appearance of buying votes as well as the real potential to buy votes." J.A. 47. He also avers he "believe[s] that the experience in the last three elections has also shown that the appearance of corruption because of campaign contributions has decreased in state elections." *Id.*

The second piece of evidence, Chairman Maupin's affidavit, states that "Missouri needed the campaign contribution limits to counter the blatant cynicism among the populace that large contributions . . . curried favor with Missouri elected officials." J.A. 48. Furthermore, he stated that "[s]ince enactment of § 130.032.1 RSMo., the perception of corruption in our government has definitely improved [sic] as a result of the campaign contribution limits." J.A. 49.

None of these assertions by the Senator or the former Chairman is corroborated or substantiated in any way. The Court is merely expected to take their word that an appearance of corruption existed and that its appearance has decreased as a result of the limits. It is on the basis on these unsupported assertions that First Amendment rights have been restricted.

In fact, research contradicts the contention that an appearance of corruption exists nationwide. One highly publicized poll released during 1997 by the Center for Responsive Politics found, in part, that 75% favored limiting soft money; 85% favored limiting out-of-district contributions; and 61% favored banning PACs. Center for Responsive Politics, *Money and Politics Survey* (visited June 2, 1999) <http://www.opensecrets.org/pubs/survey/ s2.htm>. Yet, in that same poll, 47% favored lifting *all* restrictions on campaign contributions. *Id.* And, 41% surveyed did not know federal contribution limits existed for individuals. *Id.*



Clearly, the public is confused, as the total of those favoring more restrictions and those favoring the abolition of all restrictions substantially top 100%.

For more than thirty years, reformers have worked tirelessly to convince the American public that legislators are corrupt and that these regulations are necessary. If this is the case, it should not be difficult for the government to back up these allegations of corruption with evidence.[7] At a minimum, evidentiary support must be required when States are attempting to regulate to prevent an appearance of corruption. Otherwise, there is "no way to challenge the 'appearance of corruption'-- others' subjective perception that corruption does exist-- other than to make the case that their perceptions are wrong." Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L.J. 1049, 1067 n.113 (1996). Furthermore, the State must prove that this public perception is reasonable because it is "very dangerous to suggest that the mistaken view of some could justify restricting the First Amendment liberties of others." *Id.* "Allowing the 'appearance of corruption' to justify government intrusion on First Amendment liberties essentially allows the majority to justify the suppression of minority rights through its own propaganda." *Id.*

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[7] One legal scholar has advocated that governments and reformers must provide jurisdiction-specific empirical evidence demonstrating corruption or its appearance. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 90, 112, (1999).

## III. THE CONTRIBUTION LIMITS ENACTED HERE ARE NOT NARROWLY TAILORED.

The first step on the path is analytically marked. The contribution limits implicate First Amendment interests, *Buckley*, 424 U.S. at 23, and therefore strict scrutiny is required. *See Austin*, 494 U.S. at 657 ("whether it is narrowly tailored to serve a compelling state interest"); *Berkeley*, 454 U.S. at 298 ("Contributions by individuals. . . [are] beyond question a very significant form of political expression. . . [and] regulation of First Amendment rights is always subject to exacting judicial scrutiny."); *California Medical Ass'n v. FEC*, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring)("[C]ontribution limitations can be upheld only if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."); *Bellotti*, 435 U.S. at 786 (Court applying "exacting scrutiny."). Therefore, the Court must determine whether Missouri's contribution limits are narrowly tailored. *See Primus*, 436 U.S. at 424 (When a government regulates expressive and associational conduct at the core of the First Amendment's protective ambit, it must regulate only with "narrow specificity.")(*quoting Button*, 371 U.S. at 433); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)(Statutes touching this field should be "narrowly drawn to prevent the supposed evil."). If the contributions that are limited are not large, then the State is infringing upon substantially more speech and association than is necessary and the limits are not narrowly tailored.

The State argues it may regulate contributions because there is a potential for corruption, and that it may attack anticipated harms, not just past or current ills. Pet'r Br. at 32. However, this Court has cautioned that "broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so



closely touching our most precious freedoms." *Button*, 371 U.S. at 438 (internal citations omitted). As a result the *Primus* Court rejected an attempt to regulate prophylactically:

> At bottom, the case rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," [citations omitted]. In the context of political expression and association, however, a State must regulate with significantly greater precision.

*Primus*, 436 U.S. at 437-38. Thus, "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id.* at 434.

### A. Missouri Has Not Demonstrated That Its Contributions Limits Are Narrowly Tailored.

It is clearly apparent that Missouri's contribution limit is not narrowly tailored because it amounts to a difference in kind. *See Buckley*, 424 U.S. at 30. Comparing Missouri's contribution limit as a fraction of campaign expenditures to the same fractional result in *Buckley* shows a significant difference. When the *Buckley* Court approved the $1,000 limit for federal candidates in 1976, the average overall

expenditure on a federal House race was $74,000. *See* Findings of Fact, *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *76-77 (E.D. Cal. Jan. 6, 1998) (Finding of Fact No. 280). Dividing $2,000 ($1,000 for the primary plus $1,000 for the general) by $74,000 shows that the contribution limit permitted one individual to contribute 1/37th (or 2.70%) of the overall expenditures of the average House candidate in 1976.

For the 1998 Missouri Auditor race, an individual was permitted to contribute a mere 0.73%, or 1/137th, of the overall primary and general election expenditures for the race. (Total limit of $2,150 divided by $202,712, the average amount expended for both the primary and general election). For data *see Missouri Ethics Commission* (visited May 21, 1999) <http://www.moethics.state.mo.us/MEC/1998_Report.htm>. This percentage is so low as to be almost per se noncorrupting.[8]

*Buckley* approved a limit where, on average, an entire campaign could be financed by as few as 37 contributors, notwithstanding the potential for a candidate to fall beholden to those 37 main contributors. If the Court is willing to risk candidates being "bought" by 37 contributors as a tolerable tradeoff for protecting the right to associate with candidates, then there can be no justification for diminishing the risk by

[8] Former Senator Dan Coats testified that an appearance of corruption would not arise with a $5,000 or even a $10,000 contribution as those amounts comprised only one tenth, or one half, of a percent of his approximate total receipts, and these amounts would not have influenced him to change his vote on any issue. Dan Coats, Concerning Contribution Limits to Candidates in Federal Elections, Testimony before the United States Senate Committee on Rules and Administration (May 24, 1999).



spreading it out to 137 contributors to the Missouri Auditor race.[9]

The relevance of this type of analysis is bolstered by Chief Justice Burger's observation in note six of his concurring and dissenting opinion in *Buckley*. There, Justice Burger criticizes the undifferentiated sweep of the $1,000 limit, suggesting that the potential for corrupting a candidate recipient with a $1,000 gift will vary enormously from place to place because the costs of running a campaign and the amounts spent by candidates in different locations vary enormously. *Buckley*, 424 U.S. at 244 n.6.

Finally, it is worth noting the limits are not narrowly tailored because inflation has caused them to become different in kind. This Court may take judicial notice of the fact that the $1,000 limit upheld in *Buckley* in 1976 is now worth only $302; an equivalent amount in purchasing power today would be $3,306. *See Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 523 n.4 (8th Cir. 1998)(court noting that $1,075 in 1976 dollars is the equivalent of just $378 in purchasing power today). After inflation, the $1,075 limit is so small it cannot even compare to the $1,000 limit approved in *Buckley*.

Two *amici* erroneously argue that the contribution limits are narrowly tailored because a majority of contributors did not give the maximum amount allowed, and the typical family in Missouri financially cannot make contributions at or near the limit.[10] *See* Secretaries of State

[9] The court in *California ProLife Council PAC*, found that various limits constituted only 1/727th and 1/1143rd of the average total expenditures and struck the limits based on this and other factors because they prevented candidates from communicating their messages. Findings of Fact, *California ProLife Council PAC v. Scully*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *76-77 (E.D. Cal. Jan. 6, 1998) (Finding of Fact No. 280).

[10] This argument fails to take into account the various reasons that less than a majority contributed at or near the maximum amount and also does not square with contribution patterns involving federal candidates.

Br. at 10-14; Pub. Citizen Br. at 9. Essentially, these *amici* are arguing that because an alleged majority cannot make contributions near the limit, the rest of the citizenry should be prohibited from doing so as well. However, "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 48-49 (citation omitted).

### B. Contribution Limits That Are Not Narrowly Tailored Are Themselves A Cause Of Corruption.

Low limits that actually *cause* corruption do not further the State's interest in preventing corruption or its appearance and thus are not narrowly tailored. As a result of federal contribution limits, which over time have become more restrictive due to inflation, incidents of conduit contributions, money laundering, and illegal corporate contributions have increased.[11]

The Federal Election Commission's enforcement caseload presents some evidence that the federal contribution

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Missouri ranked 13th in the nation in 1997-1998 in individual donations of $200 or more, for a total given of $10,756,955. *See* Center for Responsive Politics, *Open Secrets* (visited May 21, 1999) <http://www.opensecrets.org/states/index/MO.htm>.

[11] In a pending criminal lawsuit brought by the United States Department of Justice, Campaign Financing Task Force, the defendant is charged with, among other things, knowing and willful violation of 2 U.S.C. § 441f, or making contributions in the name of others. *United States v. Haney*, No. 98-0383-RWR (D.D.C. 1998). In his motion to dismiss the indictment, Defendant Haney argued that the $1,000 campaign contribution limitation impermissibly infringes upon his First Amendment rights because the ravages of inflation have diminished the value of $1,000 since this Court upheld the limit in *Buckley*. Memorandum of Points and Authorities Supporting Haney's Motion to Dismiss All Counts at 2.



limit of $1,000 may no longer further the Government's interest in preventing corruption or its appearance and may indeed itself have become a *cause* of corruption. Once limits become ineffectively low, citizens interested in participating in politics are induced to circumvent the limits illegally. One way that individuals, who have already given the maximum permitted under the limits, circumvent the limits is by making "conduit" contributions, in contravention of 2 U.S.C. § 441f.

The FEC has already released more 1996 cases involving conduit contribution allegations, 2 U.S.C. § 441f, than it has had in any year since its inception. *See* David M. Mason, Testimony at the Hearing on The First Amendment and Campaign Finance Reform before the U.S. House of Representatives Judiciary Committee (Subcommittee on the Constitution)(May 5, 1999)(transcript available at 1999 WL 16947304). The 1996 total is already over 20 percent higher than any previous year, and given the five year statute of limitations, additional § 441f cases may yet be made public. *Id.* In at least some of these cases, it appears donors were motivated by nothing other than enthusiasm for a candidate. *Id.*

A separate search in April 1999 of the FEC's Matter Under Review (MUR) Index, reveals a total of 191 MURs involving alleged § 441f violations. A further search located 11 pre-MURs and MURS, involving § 441f violations, not listed in the MUR Index. Thus, approximately 202 MURs have involved § 441f violations since 1976. Of those 202 MURs, approximately 37 of the alleged § 441f violations occurred from 1976 to 1979, 68 of the MURs involve conduct during 1980 to 1989, and 97 of the MURS relate to alleged violations from 1990 to the present. This translates into a 30% increase in § 441f complaints filed during the 1990s, and almost half of the total alleged violations occurring during the last ten years.

Another corrupting by-product of the federal contribution limits is an increase in political contributions by

minors. *See* CNN Interactive, *Small children, big political donations* (visited May 20, 1999) <http://cnn.com/ALLPOLITICS/stories/1999/03/01/diaper.donors/>; Alan C. Miller, *Sunday Report*, L.A. Times, February 28, 1999, at A1. Some youngsters who are not even old enough to vote are donating generously to candidates.[12] This new trend has been labeled "family bundling" because in many cases, the children's donations came on the same day or about the same time as their parents contributed the maximum amount allowed under federal limits.

Illegal corporate money-in-politics activity has also risen considerably. Of these, conduit contributions have been especially prevalent in the corporate workplace. *See* C. Cronin & J. Savage Jr., *Corporate Campaign Finance Laws: An Overview*, Mass. Lawyers Weekly, Nov. 4, 1996, at 11 (describing noteworthy cases). A charting of illegal corporate activity cases involving fines of $25,000 or more imposed by the FEC, the Department of Justice, and other federal and state agencies, by Public Disclosure, Inc. reveals that of the 165 cases listed, 41 occurred from 1969 to 1979 (20 from prior to 1976); 19 cases were from 1980 to 1989; and 105 cases were from 1990 to the present. Public Disclosure, Inc., *The Cost of Corporate Illegal Activity* (visited May 19, 1999) <http://www.tray.com/cgi-win/_vee.exe?>. Roughly 64% of these cases have been brought during the last nine years.[13]

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[12] According to FEC records, one diaper donor gave $4,000 to federal candidates by the time he was two. Alan C. Miller, *Sunday Report*, L.A. Times, February 28, 1999, at A1.

[13] These figures may just scratch the surface. Because relatively few FECA prosecutions go to trial or otherwise result in conviction-- by their own measure, the Department of Justice obtained roughly 200 criminal convictions for FECA violations through plea bargains from 1988 to 1995-- the reported case law is sparse. *See* Michael W. Carroll, "Note: When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act," 84 Geo. L.J. 551, 558 (1996)(citing an interview with Craig C. Donsanto,



This increase in illegal corporate conduit contributions, coupled with the increase in § 441f violations and new trends such as "family bundling" demonstrate that the very limits designed to prevent corruption or its appearance have themselves caused a steady increase in corruption.

The distortion of the natural flow of money from donor to candidate has created more problems than it has solved. Like efforts to stop the flow of a river, one way or another, the water will pass, diverting course to do so. We seem to have forgotten the admonition of the First Amendment that Congress, and the states through the Fourteenth Amendment, shall make no law abridging the rights of free speech. Yet the "reformers" propose regulations on top of the regulations. In trying to limit contributions, they are forced underground where they cause corruption, which it turn breeds contempt for the very political process they are working to protect.

A reading of the *amici* briefs submitted in support of the Petitioners' position reveals that few of the *amici* even acknowledge the manifest importance of the constitutional impediments to their proposed reforms.[14] One *amicus* brief, submitted by various States, goes so far as to suggest that the First Amendment "rightly give[s]" them authority. States Br. at 1. They view the First Amendment not as a limit on their power to regulate, as the Founding Fathers envisioned, but as a source of their power. *See id.* at 3-4 ("Only where those limits prevent candidates from waging a vigorous campaign should the First Amendment be read to block their enforcement. Short of that showing by a

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Director, Election Crimes Branch, Public Integrity Section, U.S. Dept. of Justice (April 19, 1995)).

[14] Few of the *amici* mention the First Amendment other than in passing. *See* Secretaries of State Br. at 18, 19 (mentioning the First Amendment only twice and not until page 18).

candidate, the States should be free to determine for themselves the most appropriate dollar-amount limit. . . ."). The freedom of speech is not a grant of power *to* the government; rather, it is a withholding of power *from* the government. *See* Lillian R. BeVier, Campaign Finance "Reform" Proposals, A First Amendment Analysis, Cato Policy Analysis No. 282 (Sept. 4, 1997)(also available at <http://www.cato.org/pubs/pas/ pa-282es.html>). They fail to see that the First Amendment was designed to *protect* political speech, rather than limit it.

> For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

*Bridges v. California*, 314 U.S. 252, 263 (1941). The First Amendment is not a loophole in the system of campaign finance, nor is it merely an obstacle to reform which must be overcome. *See generally*, Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA Law Rev. 1 (1997). Rather it is a fortress of freedom for citizens that safeguards not only free speech, but the very system of representative self-government which is our heritage.



## CONCLUSION

The judgment of the court of appeals should be affirmed.

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